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Nos. 02-722 and 02-733

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, ET AL.,
PETITIONERS

v.

HARRY LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

GERLING GLOBAL REINSURANCE CORP. OF AMERICA,
ET AL., PETITIONERS

v.

HARRY W. LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a California statute that requires an insurance company doing business in the State to disclose information about each insurance policy issued by that company or an affiliate in Europe between 1920 and 1945 (1) violates the Commerce Clause, (2) violates the Due Process Clause, or (3) impermissibly interferes with the national government's exclusive power over foreign affairs.

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INTEREST OF THE UNITED STATES

The United States has engaged in extensive diplomatic efforts to assure that the Nations and enterprises responsible for the Holocaust provide some measure of compensation to their victims. In so doing, the United States has

consistently emphasized the desirability of voluntary, non-adversarial compensation mechanisms.

California has adopted a different approach—one that interferes with the national government's diplomatic efforts. The state statute at issue here, which is expressly addressed to transactions in Europe between 1920 and 1945, interferes with the national government's authority over foreign affairs is general, and with its traditional role in addressing claims arising out of international conflicts, in particular. After a petition for certiorari was filed at an interlocutory stage of this case, this Court invited the Solicitor General to express the views of the United States. *American Ins. Ass'n* v. *Low*, 534 U.S. 1120 (2002).[1] In light of the Court's prior invitation, and the court of appeals' subsequent entry of final judgment, the United States submits this brief *amicus curiae*.

STATEMENT

1. a. Since the end of World War II, the United States has committed substantial diplomatic resources toward achieving compensation for the victims of Nazism. The United States and its allies entered into treaties with the post-War governments of Germany and Austria that required them to provide compensation to such persons. See 02-722 Pet. App. (Pet. App.) 97a-98a. More recently, the United States has engaged in extensive international discussions concerning claims arising out of the Holocaust. As a result of those discussions, the United States has entered into executive agreements with Germany and Austria and has issued a joint statement with Switzerland.

With respect to insurance claims, the United States has sought expeditious compensation for Holocaust victims in accordance with the procedures established by the Inter-

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[1] Before the United States responded to the Court's invitation, the district court, on remand, entered final judgment in the case, and the petition was dismissed under this Court's Rule 46.

national Commission on Holocaust Era Insurance Claims (ICHEIC). ICHEIC is a voluntary organization formed by five European insurance companies (including petitioners Generali and Winterthur), the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners.[2] It is chaired by former Secretary of State Lawrence S. Eagleburger. Through ICHEIC, Holocaust victims' insurance claims are processed and checked against European insurers' records in a manner consistent with European data protection laws. The State Department has stated that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." Office of the Spokesman, U.S. Dep't of State, *International Commission on Holocaust Era Insurance Claims Begins Worldwide Effort to Identify Unpaid Claims* (Feb. 15, 2000); see Pet. App. 177a (statement of Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues).

b. The United States' approach to the resolution of Holocaust victims' compensation claims, including insurance claims, is embodied in the executive agreement entered into between the United States and Germany two years ago. See Pet. App. 153a-168a. That agreement recognizes the creation of a foundation in Germany, funded with some $5 billion from public and private sources, to address Holocaust-era claims against German companies that were not addressed by earlier compensation laws. The German government agreed to supervise the activities of the foundation and to assure that the foundation publicizes its existence. *Id.* at 155a-156a (Art. 1, ¶¶ 2, 3). It also agreed that all claims by or on behalf of Holocaust victims against German insurance

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[2] The United States has observer status in ICHEIC. Several European countries, including Germany, France, Italy, Poland, and the Czech Republic, have observer status as well.

companies would be processed by those companies and the German Insurance Association based on ICHEIC procedures and additional procedures that may be agreed to among ICHEIC, the foundation, and the German Insurance Association. *Id.* at 156a (Art. 1, ¶ 4).

The United States, in turn, agreed to inform its courts that "it would be in [its] foreign policy interests * * * for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." Pet. App. 156a (Art. 2, ¶ 1). The United States also agreed to "use its best efforts" with state and local governments to achieve an "all-embracing and enduring legal peace" with respect to such claims. *Ibid.* (Art. 2, ¶ 2).[3]

2. The State of California has taken a different approach to assuring compensation for Holocaust victims and their families, both in the statute at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 *et seq.*, and several closely related statutes.

HVIRA requires the Commissioner of Insurance to establish a Holocaust Era Insurance Registry containing detailed information on insurance policies issued to Holocaust victims without regard to whether those victims ever lived in California. Cal. Ins. Code § 13803. The public is to have access to the Registry. *Ibid.* In order to obtain information for the

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[3] The executive agreement between the United States and Austria, which consists of an exchange of diplomatic notes and annexes, contains nearly identical undertakings. See *Exchange of Notes* Annex A, ¶ 14 (Jan. 23, 2001) <http://www.usembassy.at/en/policy/annexa.htm>. The joint statement of the United States and Switzerland similarly endorses ICHEIC and notes the "potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including those that are * * * participants in [ICHEIC]." *Joint Statement Between the Government of the United States of America and the Government of the Swiss Confederation* (Jan. 29, 2000) <http://www.us-embassy.ch/NEWS/jointstatement.htm>.

Registry, HVIRA requires all insurers doing business in California to disclose information concerning "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies," that were sold, "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." *Id.* § 13804(a). The disclosure obligation applies "whether the sale occurred before or after the insurer and the related company became related." *Ibid.* The information that an insurer must disclose includes "[t]he holder, beneficiary, and current status" of each policy, "[t]he city of origin, domicile, or address for each policyholder," and whether and how the policy proceeds have been paid. *Ibid.* The Commissioner must suspend the license of any insurer that fails to provide the information. *Id.* § 13806.

HVIRA declares that its requirements are "necessary to protect the claims and interests of California residents," including some 5600 Holocaust survivors living in the State, and "to encourage the development of a resolution to these issues through the international process or through direct action by the State." Cal. Ins. Code § 13801.

HVIRA is part of a statutory scheme designed to give California a central role in resolving Holocaust-era claims.[4] Another statute authorizes the Commissioner to suspend the license of an insurer upon finding that it, or any affiliate, failed to pay "any valid claim" on a policy issued to a person, whether or not a resident of the State, who was "a victim of persecution of Jewish and other peoples preceding and during World War II by Germany, its allies, or sympathizers." Cal. Ins. Code § 790.15(a) and (b)(1). It defines a "valid claim" to include claims not paid because the records were lost or the policies were confiscated by the Nazis. *Id.* § 790.15(b)(3).

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[4] See Assembly Bill No. 600 (Pet. App. 115a-122a) (noting interrelationship of HVIRA, the license-suspension provisions, Cal. Ins. Code § 790.15, and the jurisdictional provisions, Cal. Civ. Pro. Code § 354.5).

A third statute grants state courts venue and jurisdiction over such claims, and abolishes any statute-of-limitations defense if the claim is brought by December 31, 2010. Cal. Civ. Pro. Code § 354.5(b) and (c). It further provides that suits brought on these policies in California courts are "subject to California law" and that forum-selection provisions in the policies are unenforceable. 1998 Cal. Stat. ch. 43, § 2.

3. a. Petitioners, insurers that do business in California and that have European affiliates, brought suit against the Commissioner to challenge the constitutionality of HVIRA. The district court entered a preliminary injunction against the enforcement of the statute. The court held that petitioners had shown a probability of success on the merits of their claims that HVIRA impermissibly "interferes with the national government's exclusive power over external affairs," Pet. App. 95a-105a, and regulates extraterritorially in violation of the Commerce Clause, *id.* at 105a-110a.

b. The court of appeals rejected each of the constitutional grounds on which the preliminary injunction was based. Pet. App. 34a- 60a.

The court of appeals held that HVIRA, as an insurance regulation, is exempted from Commerce Clause scrutiny by the McCarran-Ferguson Act, 15 U.S.C. 1012(a). See Pet. App. 41a-45a. The court also suggested that HVIRA does not, in any event, regulate extraterritorially. The court reasoned that HVIRA "does not regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies," but instead "requires California companies only to *provide information* about" such policies. *Id.* at 43a.

The court of appeals also held that HVIRA does not impermissibly interfere with the national government's authority over foreign affairs. Pet. App. 58a-59a. The court suggested that such interference could not appropriately be found because petitioners had made a "facial" challenge to

HVIRA, because HVIRA "mainly involve[s] foreign commerce," and because HVIRA is "not directed at a particular country." *Ibid.* The court remanded the case for consideration of petitioners' due process claim.

4. a. On remand, the district court permanently enjoined the enforcement of HVIRA. The court held that HVIRA violates the Due Process Clause by suspending insurers' licenses for not making the required disclosures, without enabling them to raise defenses such as a foreign law prohibition against disclosure. Pet. App. 78a-83a.

b. The court of appeals reversed. Pet. App. 1a-33a.

The court of appeals held that HVIRA does not violate due process constraints on California's legislative jurisdiction because HVIRA merely regulates the insurance industry within California. Pet. App. 9a. The court expressly declined to follow *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated a similar statute on due process grounds because of its extraterritorial reach. Pet. App. 9a-11a.

In addition, the court of appeals held that HVIRA does not violate due process by denying insurers an opportunity to defend against the suspension of their licenses. Pet. App. 20a-29a. The court also reiterated its earlier holdings sustaining HVIRA under the Commerce Clause and the foreign affairs power. *Id.* at 29a.

ARGUMENT

The court of appeals, in upholding a California statute that requires insurers doing business in the State to make sweeping disclosures about transactions that occurred exclusively in Europe between European parties, disregarded constitutional constraints on a State's authority to regulate extraterritorially and to inject itself into matters of foreign relations reserved to the President and Congress. The court of appeals' decision is inconsistent with this Court's decisions articulating those constraints under the Commerce Clause,

the Due Process Clause, and the foreign affairs power of the national government, and is in direct conflict with the Eleventh Circuit's recent decision invalidating a similar statute on due process grounds. In addition, the court of appeals' decision undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes. For these reasons, the petitions for a writ of certiorari should be granted.

I. HVIRA VIOLATES CONSTITUTIONAL PROHIBITIONS ON EXTRATERRITORIAL STATE REGULATION

Both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment prohibit a State from regulating activity outside its borders. HVIRA is such an extraterritorial regulation because it focuses exclusively on transactions in Europe before and during World War II and compels the disclosure of information about those transactions although they have "no jurisdictionally-significant relationship to [the State]." *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001).

A. The Commerce Clause And The Due Process Clause Prohibit States From Regulating Transactions Outside Their Borders

1. Under familiar Commerce Clause principles, California may not require corporations to adhere to its standards in other States or Nations as a condition of doing business in California. See, *e.g.*, *BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) (a State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"); *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's

borders"). A state law does not cease to be extraterritorial merely because it has some nexus to local persons or activities. Such a law is impermissibly "extraterritorial" for purposes of the Commerce Clause if it has "the practical effect of * * * control[ling] conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

The Commerce Clause's prohibition on a State's regulation of conduct beyond its borders protects against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-337. When, as here, a State seeks to project its regulatory regime into the jurisdiction of another Nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy. Cf. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (even *federal* laws must clearly indicate that they are to apply extraterritorially to "protect against unintended clashes between our laws and those of other nations which could result in international discord").[5]

2. A State is also constrained by the Due Process Clause from regulating contracts or transactions that do not have a significant relationship to its legitimate interests. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-819 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). In *Dick*, for example, the Court held that a Texas insurance statute could not, consistent with due process, be applied to invalidate a provision contained in a policy that had been issued in Mexico and was to be performed there. See 281

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[5] In addition, the Commerce Clause protects against state regulation, whether or not viewed as extraterritorial, that prevents the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). As discussed below (at 16-19), HVIRA presents that constitutional deficiency as well.

U.S. at 408. The Court explained that, because all acts relating to the making and performance of the policy occurred outside the State, "Texas was therefore without power to affect the terms of contracts so made." *Ibid.*; see *id.* at 408 n.5 ("[A] State is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."); *Shutts*, 472 U.S. at 821 (a State cannot apply its own law to "a transaction with little or no relationship to the [State]").

Those cases make clear that a State is not entitled under the Due Process Clause to regulate out-of-state transactions simply because some parties to those transactions reside within the State. Indeed, the policyholder in *Dick* was a citizen and permanent resident of Texas, although he engaged in all conduct relevant to the policy while in Mexico. The Court held that Texas did not have a sufficient relationship to the policy to permit the State to regulate it. See 281 U.S. at 408. And, in *Shutts*, the Court held that Kansas could not apply its law to out-of-state plaintiffs' claims with respect to out-of-state leases, although the defendant did business in the State. See 472 U.S. at 818-819.

B. HVIRA, By Imposing Disclosure Requirements With Respect To Out-Of-State Transactions Between Out-Of-State Parties, Is An Impermissible Extraterritorial Regulation

1. Whether analyzed under the Commerce Clause or the Due Process Clause, HVIRA is an impermissible extraterritorial regulation. Its "practical effect" is to compel "conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336—specifically, the collection, compilation, and disclosure of information, presumably located in Europe, concerning transactions that occurred exclusively in Europe between European parties. There is no nexus between those transactions and the legitimate interests of California that permits the State to exercise regulatory authority over

them. It is especially evident that HVIRA exceeds the proper legislative jurisdiction of the State because the statute is not one of general applicability that happens to have an extraterritorial effect; instead, HVIRA is specifically directed at transactions that occurred in Europe during a time of international conflict.

The conclusion that HVIRA is an unconstitutional exterritorial regulation is confirmed by "considering how [such laws] may interact with the legitimate regulatory regimes of other States," *Healy*, 491 U.S. at 336, and Nations. It is plain that HVIRA has the potential to interfere with other jurisdictions' laws limiting the disclosure of private information concerning insurance policies issued in those jurisdictions. As the court of appeals recognized, an insurer that fails to disclose the information required by HVIRA will have its California license suspended, even if "disclosure pursuant to HVIRA [would] violate[] European data protection laws." Pet. App. 25a.

2. The court of appeals reasoned that HVIRA is not an impermissible extraterritorial regulation because it does "not seek to regulate the substance of out-of-state transactions." Pet. App. 15a (addressing due process challenge); accord *id.* at 43a (addressing Commerce Clause challenge). The court viewed HVIRA as "requir[ing] California insurers *only to disclose information about* their foreign transactions or those of their affiliates." *Id.* at 16a.

The court of appeals' reasoning rests on the erroneous premise that "[a] request for information is simply not equivalent" to a regulation. Pet. App. 16a. A requirement that a person disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation on that person, the violation of which carries adverse consequences. See *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) (describing "rules which require regulated entities to disclose information" as "[a]mong the

regulatory tools available to [the] Government"); see also *BMW*, 517 U.S. at 572-573 (a State may not impose sanctions for failure to follow its disclosure standards in other States); *Gallagher*, 267 F.3d at 1238 (observing that the disclosure provisions of a similar statute "pertain to, and as a practical matter unquestionably seek to regulate," Holocaust-era policies). Indeed, the tension between HVIRA and European privacy laws belies any claim that disclosure or privacy laws do not regulate or present Commerce Clause and Due Process Clause difficulties.

The court of appeals suggested that HVIRA is constitutionally justified by the State's purpose to "protect[] its residents from insurance companies that have not paid valid claims." Pet. App. 16a. A State cannot evade limits on extraterritorial legislation merely by deeming a corporation's conduct abroad relevant to its ability to perform within the State. More broadly, a statute with an impermissible extraterritorial effect cannot be saved by identifying an arguably permissible domestic purpose. In any event, the express purpose of HVIRA is to facilitate the resolution of claims on policies issued in Europe before and during World War II, rather than to assess the fitness of insurers to do business in California today. See Cal. Ins. Code § 13801(d) and (e) (HVIRA is designed "to ensure the rapid resolution of * * * questions" concerning "insurance policies held by Holocaust victims and survivors," so as to "eliminat[e] the further victimization of these policyholders and their families"); see also pp. 5-6, *supra* (discussing related statutes directed at facilitating such claims). By contrast, HVIRA makes no mention of the purpose that the court posited.

Nor do any other features of HVIRA suggest that its purpose or primary operative effect is to enable the Commissioner to verify the *bona fides* of insurers doing business in the State. To the contrary, HVIRA requires insurers to

provide information for a public Holocaust Era Insurance Registry. Moreover, the information sought by HVIRA is too remote, too dated, and, at the same time, too detailed to support the court of appeals' posited purpose. That information is tailored to the payment of past European claims, not to the assessment of current in-state performance. Indeed, the Commissioner already has broad statutory authority to gather information to assess the "fairness and honesty of methods of doing business" of any insurer that seeks to do business in the State. Cal. Ins. Code §§ 717 (qualifications of license), 733 (authority to examine "all [the insurer's] affairs"), 1215.6 (authority to obtain documents in possession of "the insurer or its affiliates").

3. The Ninth Circuit's decision upholding HVIRA under the Due Process Clause cannot be reconciled with the Eleventh Circuit's decision in *Gallagher* invalidating a similar Florida statute. In *Gallagher*, as here, the statute required each insurer doing business in the State to disclose extensive information concerning policies issued by itself or its affiliates in Europe between 1920 and 1945. See 267 F.3d at 1229-1230. The Eleventh Circuit held that the statute "exceed[ed] the constitutionally permissible regulatory authority of the Florida legislature" under the Due Process Clause, because the statute required "Florida insurers * * * to produce and compile information regarding transactions between non-Florida residents that occurred entirely outside Florida." *Id.* at 1234; see *id.* at 1238 (recognizing that "there is virtually *no* connection between the State of Florida" and the subject of the disclosure statute, *i.e.*, "insurance transactions involving [domestic insurers'] German affiliates that took place years ago in Germany, among Germany residents, under German law, relating to persons, property, and events in Germany").[6]

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[6] None of the grounds on which the Ninth Circuit attempted to distinguish *Gallagher* from this case is persuasive. For example, the Ninth

4. The court of appeals held that HVIRA was shielded from Commerce Clause scrutiny by Section 2(a) of the McCarran-Ferguson Act, 15 U.S.C. 1012(a), which provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." See Pet. App. 40a-45a. That holding is inconsistent with this Court's recognition in *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), that the McCarran-Ferguson Act was not intended to "authorize state regulation of extraterritorial activities." *Id.* at 301; see *id.* at 300 ("Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated."). The Court explained that a contrary construction of the Act would raise serious constitutional questions, *id.* at 302, and undermine Congress's "basic motivating policy" of leaving the regulation of insurance to those "in close proximity to" the people and policies regulated, *id.* at 301-302.[7]

Circuit suggested that the Florida statute, in contrast to HVIRA, sought information directly from "both local and foreign entities." Pet. App. 9a-10a. In fact, the Florida statute, like HVIRA, applies directly only to "[a]ny insurer doing business in th[e] state." *Gallagher*, 267 F.3d at 1230. In addition, the Ninth Circuit suggested that the Eleventh Circuit did not consider whether the Florida statute could be justified as a means of assessing insurers' fitness to do business in the State. See Pet App. 10a. In fact, the Eleventh Circuit noted the State's "litigating position" that the statute could be so justified, but concluded that the text and structure of the statute did not support that position. See *Gallagher*, 267 F.3d at 1239-1240. The Ninth Circuit further suggested that the Florida statute was distinguishable because it "contained both disclosure and substantive elements" governing Holocaust-era claims. Pet. App. 10a- 11a. The legislation that enacted HVIRA, however, likewise contained other provisions to facilitate the litigation of such claims. See *id.* at 117a-118a.

[7] As the court of appeals observed (Pet. App. 41a), *Travelers* arose under an exception to the McCarran-Ferguson Act that provides that certain Acts of Congress "shall be applicable to the business of insurance to

II. HVIRA IMPERMISSIBLY INTRUDES INTO MATTERS OF FOREIGN RELATIONS RESERVED TO THE NATIONAL GOVERNMENT

1. This Court has repeatedly emphasized that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979); see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government * * * is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). The national government's preeminent role in acting for the United States in the international arena is reflected in the Constitution's express grants of power to Congress, see, *e.g.*, Art. I, § 8, Cls. 1, 3, 11 (powers to "provide for the common Defence," "regulate Commerce with foreign Nations," and "declare War"), and to the President, see, *e.g.*, Art. II, §§ 2, 3 (powers to serve as "Commander in Chief of the Army and Navy," "make Treaties," "appoint Ambassadors," and "receive Ambassadors"), and in its express restraints on state power, see, *e.g.*, Art. I, § 10 (restrictions on States' "enter[ing] into any Treaty, Alliance, or Confederation," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement * * *

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the extent that such business is not regulated by State Law." 15 U.S.C. 1012(b). The exception is the mirror image of the general rule in 15 U.S.C. 1012(a) that "[t]he business of insurance * * * shall be subject to the laws of the several States which relate to the regulation * * * of such business." Nothing in the text, structure, or history of the McCarran-Ferguson Act provides any reason to view the scope of the States' authority to regulate insurance differently under the two similarly worded provisions.

with a foreign Power," and "engag[ing] in War"). The national government has traditionally exercised such power in dealing with foreign governments with respect to the resolution of claims in the wake of international conflict. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981).

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines*, 312 U.S. at 63, state "regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968); see *Japan Line*, 441 U.S. at 449 (state regulations may not prevent the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments"). This Court has struck down such state regulations, "even in [the] absence of a treaty" or an Act of Congress, *Zschernig*, 389 U.S. at 441, as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause. See, *e.g.*, *Japan Line*, 441 U.S. at 452-453 (foreign commerce); *Zschernig*, 389 U.S. at 436 (foreign affairs); *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875) (same).

2. HVIRA intrudes into matters of foreign relations exclusively reserved to the national government. The resolution of claims arising out of the Nazi era in Europe has long been a subject of United States diplomatic attention. In the context of still-unresolved claims against foreign enterprises arising out of the Holocaust, the President has determined that it is preferable for such claims to be pursued through non-adversarial processes rather than litigation. The President has concluded that such an approach serves the interests of Holocaust victims and their families as well as the United States' interest in cooperative relations with its European allies.

In particular, the United States, in its executive agreements with Germany and Austria and its other recent diplomatic efforts, has encouraged the use of ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. Those agreements do not, of their own force, extinguish or bar any claims that Holocaust victims or their families might assert in court against German and Austrian companies. They do make clear, however, that United States policy disfavors the imposition of further obligations on companies subject to the agreements, whether through regulation or litigation, beyond those contemplated by the agreements themselves. Thus, the executive agreement between the United States and Germany recognizes that it is "in the[] interests" of the two governments for the designated claims process "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Pet. App. 155a (Art. 1, ¶ 1).

HVIRA threatens to "impair the effective exercise," *Zschernig*, 389 U.S. at 440, of United States policy with respect to Holocaust-era claims. As explained above, the United States has sought to achieve voluntary participation in international claims processes and to encourage the exclusive use of those processes as an expeditious, fair, and comprehensive alternative to litigation. State laws such as HVIRA are not laws of general applicability with an incidental effect on the federal government's ongoing efforts. To the contrary, they are expressly and specifically directed at establishing competing processes with their own disclosure requirements and potentially their own forums and remedies for Holocaust-era claims. Such laws impose "a different, state system of economic pressure," *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 376 (2000), and may impede the implementation and operation of the

international claims processes. See, *e.g.*, *Joint Statement*, note 3, *supra*, (noting the "potentially disruptive and counterproductive effects" of such laws). At a minimum, such laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381. They also generate the very tensions in foreign relations that the United States has sought to avoid. For example, the United States has received protests from Germany and Switzerland concerning HVIRA's application to insurance policies written in those countries.

3. In declining to invalidate HVIRA as inconsistent with the national government's authority over foreign affairs, the court of appeals attempted to distinguish this case from *Zschernig*. None of its suggested distinction bears on whether HVIRA is an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts in the President and the Congress." *Zschernig*, 389 U.S. at 432.

For example, the court of appeals observed that the Court invalidated the state probate statute in *Zschernig* only after the statute had disrupted foreign relations. See Pet. App. 56a-59a. Nothing in *Zschernig* suggests that a state statute cannot be invalidated until its adverse impact on foreign relations has been fully manifested. And, in *Chy Lung*, the Court invalidated a state statute, without any inquiry into its actual impact, on the ground that the statute, by its nature, would create international tension. See 92 U.S. at 279. In any event, as the protests from Germany and Switzerland demonstrate, HVIRA has, in fact, affected the United States' foreign relations.

The court of appeals also sought to distinguish *Zschernig* on the grounds that HVIRA "involve[s] foreign commerce" and is "not directed at a particular country." Pet. App. 59a. To the extent that those observations accurately distinguish

Zschernig, they suggest that HVIRA is more, not less, constitutionally problematic. A state statute that interferes with the United States' *commercial* relations with other Nations may be invalid under *both* the Foreign Commerce Clause and the foreign affairs power. See *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 53-55, 68-69 (1st Cir. 1999) (invalidating state statute on both foreign affairs and foreign commerce grounds), aff'd on other grounds, 530 U.S. 363 (2000). Nor need a state statute be "directed at a particular country" to be invalidated under the foreign affairs power. No such statute was involved in *Chy Lung* or *Zschernig*. Moreover, HVIRA is clearly directed at insurance policies issued to persons in certain European countries, which explains why it has drawn objections from two of those countries and which makes its interference with foreign affairs even more manifest.

Finally, the court of appeals erred in refusing, based on a misunderstanding of *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994), to consider the views of the Executive Branch regarding the foreign policy ramifications of HVIRA. See Pet. App. 55a. As this Court has explained, *Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions. See *Crosby*, 530 U.S. at 385-386. *Crosby* reaffirms the central importance in other situations of the President's views in exercising his constitutional responsibility "to speak for the Nation with one voice in dealing with other governments." *Id.* at 381, 385-386.[8]

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[8] The court of appeals incorrectly viewed the Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611, as a congressional endorsement of state statutes such as HVIRA. See Pet. App. 47a-50a. The Act establishes a commission to address the disposition of certain Holocaust-era assets that "came into *the possession or control of the Federal Government*" after January 30, 1933. § 3(a)(1), 112 Stat. 612 (emphasis added). It directs the commission to "encourage the National

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, *doing business in the U.S.* at any time after January 30, 1933," that issued an insurance policy to "any individual on any list of Holocaust victims." § 3(a)(4)(A), 112 Stat. 612 (emphasis added). It states that the report should include, "to the degree the information is available," the "number of policies issued by each company" to Holocaust victims, the "value of each policy at the time of issue," the "total number of policies and the dollar amount[s] that have been paid out," and the "total present-day value of assets in the United States of each company." § 3(a)(4)(B), 112 Stat. 613. Nothing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law.

* The Solicitor General is recused in this case.